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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 212.

THE WILLIAM W. BIERCE, Limited, a corporation,
Appellant.

vs.

CLINTON J. HUTCHINS, Trustee,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

ANSWER TO REPLY BRIEF FOR APPELLEE.

CHARLES H. ALDRICH,
HENRY S. McAULEY, and
HENRY W. PROUTY,
Attorneys for Appellant.

The trial court made a full finding of facts and conclusions of law and to these findings both of law and fact specific exceptions were taken by the appellee (Rec., 2-34), also (Rec., 109-111). The question was thus presented to the Supreme Court of the Territory. It was the manifest duty of the latter court to pass upon these findings. It did that, as we contend, when it specifically limited its adverse action to a reversal of the lower court upon the question of election between remedies. The conclusive character of these findings is shown by the cases collected, 4 Annotated Stat., 460 *et seq.*

Courts speak only by the orders, judgments and decrees entered. An appeal or writ of error cannot be predicated of what a court thinks or says apart from these. To this there is the single exception, as we believe, of language used or rulings made in the course of a trial deemed prejudicial and preserved by bill of exception or certificate. In the present case, in the judgment entered May 2nd, 1905 (Rec., 316), we find the following language:

> "And the exceptions thereto taken by the defendant as set out in his bill of exceptions in so far as they raise the question of election are sustained, and said cause is hereby remanded to the Circuit Court with directions to dismiss the plaintiff's petition with costs."

It can require neither argument nor comment to establish the fact that this limits the action of the court to the exceptions, the subject with and upon which the court was acting to those that "raise the question of election." At page 319 of the Record in the order modifying the judgment the same limitation again appears, and on page

320 of the Record we find the third and final judgment containing this language:

> "And the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded with directions to enter judgment for the defendant with costs."

It is from the decree thus made that this appeal is prosecuted, not from the opinion or opinions of the court or the several judges constituting the same.

It is now said that it is apparent from these opinions that the Supreme Court did not agree with the lower court with respect to other findings of fact and conclusions of law.

To this contention there are two conclusive answers: First, if the court wished to disturb or overrule any other finding of fact or conclusion of law, it was its duty to do so in express terms and embody its action in the orders entered in the cause. Instead of doing so it adopted all the other findings by limiting its action overruling the exceptions to those involving the question of election.

Second. Such reference or use of the Court's opinion is not permissible.

Williams *v.* Norris, 12 Wheat., 117.
Parks *v.* Turner, 12 How., 39.
Fisher *v.* Cockerell, 5 Pet., 248.
Rector *v.* Ashley, 6 Wall., 142.
Gibson *v.* Choteau, 8 Wall., 314, 317.
England *v.* Gebhardt, 112 U. S., 502.

To the same effect are:

Seaverns *v.* Lichinski, 181 Ill., 358.

Calumet Elec. St. Ry. Co. *v.* Van Pelt, 173 Ill., 70.
Noyes *v.* Children's Aid Soc., 70 N. Y., 481, 485.
Attorney General *v.* Continental Life Ins. Co., 90 N. Y., 45, 48.
Laning *v.* N. Y. Cent. R. R. Co., 49 N. Y., 521, 539.
Wheatland *v.* Pryor (Sup. Ct.), 44 N. Y., 311; affd. 133 N. Y., 97.

There are cases where this court has looked into the opinion to determine whether a federal question was involved, as in Murdock *v.* Memphis (20 Wall., 590), and cases since decided. These, however, have nothing to do with the question here involved. This court would not take a case as involving a federal question because the judge of the State court in his opinion discussed one, unless the right had been claimed and preserved in the record by one of the parties thereto.

In Weyer *v.* Beach, 79 N. Y., 409, the opinion at General Term stated that the reversal of the judgment was placed upon two grounds, one of which was that the court disagreed with the referee as to the facts. The order of reversal, however, did not state that it was made on a question of fact. Held, that in the Court of Appeals respondent could not avail himself of the view of the facts taken by the court at General Term, but must abide by the findings of the referee, there being some evidence to support thereof.

This, in principle, is in accord with the language of this court in Canal Company *v.* Gordon, 6 Wall., 561, 568, where the court said:

> "According to the rule of this court, the appellee can ask nothing here but what the

decree gave him. It is the appellants who complain."

The decree in the Supreme Court of the Territory gave the appellee's exceptions support only so far as they raise the question of election. For the appellee to ask this court to find any other exceptions sustained violates the rule stated above and universally recognized.

We do not follow counsel in their attempt to rediscuss the doctrine of election as between the parties to the agreement or those claiming under them with full notice. The case stated in our original brief (p. 50) and the authorities cited (pp. 31-44) make clear the rule to be applied as between the parties and privies with notice where the rights of innocent third parties are not involved.

The findings clearly show, as does the record (to which appellee so mistakenly refers) that the lien suit was commenced upon a contract no longer in effect, and to secure rights to which the attempted lienor was not entitled for property which was not the subject and could not be made the subject of a materialman's lien. Such conditions do not afford an opportunity for a choice between remedies, and where they exist no election has taken place as between inconsistent remedies even if third parties have acquired interests in the subject matter of the suit.

So, too, the contract of March 13th, 1901, was a good conditional sale contract as between the parties and privies with notice, and even if that question as a question of fact were open, as it is not upon this record, or is to be considered by this court as a question of law, the title remains in

plaintiff in error and the judgment of the Supreme Court of the Territory should be reversed with directions that a judgment be entered in the court below as originally found by the trial court.

Respectfully submitted,

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